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Corbin Davis
Clerk of the Court
Michigan Supreme Court
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Lansing, MI 48909

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Michael Franck Building
Lansing, MI
48933-2012

**RE ADM File No. 2009-04: Proposals Regarding Procedure for
Disqualification of Supreme Court Justices**

Dear Clerk Davis:

At a special meeting of the Board of Commissioners of the State Bar on August 21, 2009, the Board discussed several issues raised in the Court's order publishing for comment proposals for the disqualification of Supreme Court Justices, as a supplement to the positions communicated to the Court on July 28.

The issues on which a majority of the Board in attendance at the meeting reached consensus are the following:

1. What the procedures for review of a Justice's recusal decision should be.

At its July 24th meeting the Board of Commissioners voted that a Justice's recusal decision, as is the case with judges, should be reviewable; but the Board deferred the question of how decisions should be reviewed. At its August 21 meeting the Board adopted a position in support of the federal court avenue demonstrated by Caperton and, in addition, favored the creation of an independent panel to review decisions at the state level. The Board acknowledged that there may be constitutionality questions about establishment of an independent state panel under the current state constitution, and believed that if necessary a constitutional amendment should be sought to achieve the creation of the independent panel. The Board discussed options for the composition of an independent panel but makes no recommendations concerning how an independent review panel would be constituted. A small minority of the Board opposed this recommendation.

2. Whether a duty to sit should be included in the disqualification rule.

The Board of Commissioners unanimously recommends adopting the ABA model rule language, "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by [the disqualification rule] or other law," with the understanding that the rule is intended to mean that the duty to sit is trumped where grounds for disqualification exist.

3. Whether a public statement by a judge or Justice that commits the judge or Justice to a particular result should be grounds for disqualification.

The Board of Commissioners supports the following modified version of ABA model rule 2.11(A)(5) as a grounds for disqualification: When a "...judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy" should be grounds for disqualification. A single Board member supported including the words "or appears to commit", which are contained in the ABA model rule.

4. Whether a judge or Justice's former service in governmental employment that involves the judge or Justice's public, personal, substantial participation concerning the proceeding should be grounds for disqualification.

A narrowly divided Board voted to support the following modified version of the ABA model rule language of 2.11(A)(6)(b): When a judge or Justice has "served in government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding" that should be grounds for disqualification. Those opposed to the adoption of this criterion for disqualification expressed concern with its vagueness and its potential chilling effect on public officials considering a judgeship.

5. Whether the grounds for disqualification of Justices and judges should be the same.

The Board unanimously voted that the grounds for disqualification of Justices and judges should be the same. The Board also agreed that in a provision of the disqualification rule addressing actual bias, the Board interprets the words "actual" and "personal" to be the same, pursuant to the decision in Cain v Michigan Department of Corrections, 451 Mich 470, 494-495 (1996).

Sincerely,

A handwritten signature in black ink, appearing to read "Janet K. Welch", with a large, stylized initial "J".

Janet K. Welch
Executive Director